

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34514

RARITAN CENTRAL RAILWAY, L.L.C.
— OPERATION EXEMPTION —
HELLER INDUSTRIAL PARKS, INC.

Decided: June 25, 2004

This decision denies a petition by Consolidated Rail Corporation (Conrail), Norfolk Southern Railway Company (NS), and CSX Transportation, Inc. (CSXT) (Conrail, NS, and CSXT will be referred to collectively as petitioners) to stay the effectiveness of the 49 CFR 1150.41 exemption invoked by a notice filed in this proceeding by Raritan Central Railway, L.L.C. (Raritan).

BACKGROUND

Raritan's Exemption Notice. On June 15, 2004, Raritan, an existing Class III rail carrier, filed a verified notice of exemption under 49 CFR 1150.41 to operate approximately 1.0 route mile and approximately 2.0 track miles of railroad trackage and right-of-way inside Heller Industrial Park, Edison Township, Middlesex County, NJ. Raritan, which currently leases and operates rail trackage in a nearby industrial park (the Raritan Center Business Park, located about 3 miles from Heller Industrial Park), indicates that it has executed a license agreement effective August 15, 2004, with Heller Industrial Parks, Inc. (Heller), granting Raritan the exclusive right to use all railroad trackage on Heller's property for the purpose of providing railroad service to all railroad customers within Heller Industrial Park. Raritan also indicates that it plans to consummate the transaction described in its verified notice, and to commence operations, on or about August 15, 2004. Raritan further indicates that it intends to hold itself out to provide common carrier rail freight service over the subject rail facilities.

In its notice, Raritan states that Conrail currently serves the subject trackage as an industrial spur. Raritan further states that, upon Raritan's takeover of service, Raritan will replace Conrail as the exclusive provider of rail service.

The Stay Petition. On June 18, 2004, a request to stay Raritan's section 1150.41 exemption was filed by petitioners. Petitioners advise that, although the track in Heller Industrial Park is currently operated by Conrail (and apparently only by Conrail), CSXT and NS also currently have the right, pursuant to the Board's decision authorizing the "Conrail Acquisition," to operate their own trains over this track (the maps submitted by Raritan indicate that this track is located in the North Jersey Shared

Assets Area). Petitioners further advise that they intend to file a petition under 49 U.S.C. 10502(d) to revoke the exemption sought by Raritan.

Petitioners suggest that the track at issue is a line of railroad rather than switching track, and they note that, absent a stay of the exemption, Raritan's notice would ordinarily become effective shortly. Therefore, they contend: that, although Raritan does not intend to begin operations until August 15, 2004, proceedings on a petition to revoke are unlikely to be completed before that date, and, under the Board's regulations, a petition to revoke does not automatically stay a section 1150.41 exemption, see 49 CFR 1150.41(c); and that, therefore, unless Raritan's exemption is stayed, Raritan will have "apparent authority" from the Board to operate the rail line as a common carrier without any determination having been made by the Board that the line is subject to the Board's licensing authority and, if so, that Conrail, CSXT, and NS may lawfully be evicted from the line. Petitioners further contend that, because there is no way to determine from the information in Raritan's notice, including the maps, exactly which tracks are included in its exemption petition, it may be that Raritan seeks not only to operate over trackage owned by Heller but also to operate over trackage owned by Conrail. Petitioners insist that, whatever right Raritan may ultimately be found to have to operate over trackage owned by Heller, it cannot assert any right to operate over Conrail trackage absent an agreement with Conrail, which it does not have.

Petitioners argue that the traditional criteria for a stay (irreparable harm absent a stay, likelihood of success on the merits, no substantial harm to other interested parties, and the public interest) are met in this case. (1) Petitioners claim that they will suffer irreparable harm without a stay because Heller will be able to force them off the line without the Board authorization that they contend is required. (2) Petitioners argue that they will likely succeed on the merits because neither Conrail nor any other railroad is authorized to discontinue common carrier service to shippers over a line of railroad, even when the operating agreement that originally gave it access to the line has expired or been terminated, and even if the owner of the line asserts a right to terminate the railroad's access to the line. (3) Petitioners allege that there is nothing to suggest that Raritan, Heller, or any of the shippers served by the line in question will suffer any substantial injury as a result of maintaining the status quo pending the results of a revocation proceeding. Petitioners add that they have received no complaints regarding service in the area, and they further add that Conrail is prepared to continue providing service under the same conditions during the revocation proceeding. (4) Finally, petitioners argue that the public interest will be served if the exemption is stayed so that the Board will be able to resolve on an adequate record — not simply on the basis of a 7-day notice — the question of whether the track at issue is a line of railroad for which common carrier authorization is required.

NS's Supplemental Statement. In a "supplemental statement" filed June 21, 2004, as "clarified" by a pleading filed on June 25, 2004, NS argues that Raritan's notice of exemption will result in the elimination of non-discriminatory Conrail service to shippers in Heller Industrial Park and will also result in the elimination of the right of CSXT and NS to provide direct service to the shippers in Heller Industrial Park.

Raritan's Reply. By reply filed June 24, 2004, Raritan urges the rejection of the stay request. As respects the "line of railroad" issue, Raritan contends that it "understands" that the subject trackage was originally constructed in the early 1970s by the Lehigh Valley Railroad (Lehigh) pursuant to a Lehigh-Heller agreement dated (a copy, or at least a partial copy, of the agreement executed in 1973, is attached to Raritan's pleading as Exhibit A). Raritan further contends that, pursuant to the agreement, Lehigh and later Conrail operated the tracks inside Heller Industrial Park as tracks excepted from entry/exit regulation under what is now 49 U.S.C. 10906.

As respects the irreparable harm issue, Raritan contends that Heller and its tenants regard the service provided by Conrail as unsatisfactory. Raritan advises that, after a series of derailments occurred resulting in damage to the industrial park's track for which Conrail sought to hold Heller responsible, Heller terminated the agreement and decided to replace Conrail with another carrier.

As further respects the irreparable harm issue, Raritan has attached to its pleading as Exhibit B a letter from Superior Warehousing Systems, Inc. (Superior), which has a facility in Heller Industrial Park. Superior's letter indicates that, in Superior's opinion, Superior will suffer substantial injury as a result of the maintenance of the status quo. Conrail's service, Superior claims, has been deficient.

As respects the claim that the notice of exemption extends beyond Heller Industrial Park to track owned by Conrail itself, Raritan advises that it does not intend to operate over Conrail track located outside Heller Industrial Park. Raritan adds that, to the extent it may have unintentionally indicated that it would operate over and serve customers on Conrail-owned lines, it will amend its notice of exemption to delete any suggestion of operating over or serving customers on Conrail-owned track. Raritan further adds that it only seeks to serve customers located inside Heller Industrial Park.

DISCUSSION AND CONCLUSIONS

The standards governing disposition of a petition for stay are: (1) whether petitioners are likely to prevail on the merits; (2) whether petitioners will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay is in the public interest. Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

Because petitioners have not satisfied the standards for a stay, their stay petition will be denied.

The Merits. Petitioners have not demonstrated a likelihood of success on the merits as respects any of the three issues they have raised.

(1) Petitioners have argued that Raritan's notice purports to embrace not only track owned by Heller but also track owned by Conrail. This issue, however, must be resolved against petitioners in

view of Raritan's disclaimer of any intent to operate over Conrail-owned track. It is clear from the pleadings that Raritan intends to operate on track owned by Heller within the industrial park, not on track owned by Conrail.

(2) Petitioners have argued that the tracks within Heller Industrial Park are railroad lines subject to Board entry and exit licensing under 49 U.S.C. 10901 and 10903 and, therefore, Heller (the owner of these tracks) cannot force Conrail to cease operations on these tracks unless the Board has first authorized an adverse abandonment. This issue, however, must be resolved against petitioners in view of their failure to establish that the tracks within Heller Industrial Park are railroad lines. The only indication in the record as to the date of construction of these tracks was furnished by Raritan, which advises that it "understands" that these tracks were originally constructed in the 1970s. Therefore, for present purposes, this assertion is accepted. But a 1970s construction date, combined with petitioners' failure to establish that either Lehigh or Conrail ever sought regulatory approval (either from the Interstate Commerce Commission or from the Board) for the construction or operation of these tracks, undermines petitioners' claim that these tracks are railroad lines. It should be noted that Conrail, CSXT, and NS will continue to have a role in providing service to shippers that are located within the Heller Industrial Park whether or not they provide direct service to those shippers.

(3) Petitioners have argued that, even if the tracks within Heller Industrial Park are "excepted track" (i.e., tracks exempt from entry/exit regulation under section 10906) as respects Conrail, they must also be excepted track as respects Raritan. This issue, however, must be resolved against petitioners in view of Board precedent "that track may have different regulatory status for different users." Yolo Shortline Railroad Company — Lease and Operation Exemption — Port of Sacramento, STB Finance Docket No. 34114 (STB served Feb. 3, 2003), slip op. at 4 n.9.

Harm to Petitioners. Petitioners have not demonstrated that they will be irreparably harmed in the absence of a stay. Petitioners can promptly file a petition to revoke Raritan's exemption, and petitioners' arguments respecting Heller's right to evict Conrail from the Heller Industrial Park can be evaluated in the revocation proceeding.

Harm to Others. There is reason to believe that issuance of a stay could substantially harm shippers in Heller Industrial Park. A stay would prevent Raritan from establishing the operations it has contracted with Heller to establish, thereby preventing shippers in the park from enjoying the benefits of Raritan's service.

The Public Interest. Under the circumstances, petitioners have not shown that issuance of a stay would be in the public interest. There is no compelling reason to issue a stay that would prevent Raritan from providing service to customers that would apparently prefer Raritan's service over the service of petitioners.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The stay petition filed June 18, 2004, by petitioners is denied.
2. This decision is effective on the service date.

By the Board, Roger Nober, Chairman.

Vernon A. Williams
Secretary